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well to remind us of the origins of our Nation's policy on freedom of information. That passage reads as follows:

Congress shall make no law . . . abridging the Freedom of speech, or of the press. U.S. Constitution, First Amendment.

Besides the obvious virtues of an open government, the Freedom of Information Act (FOIA) is particularly valuable to a nation founded on individual freedom and government accountability. President Reagan has reinvigorated our awareness that the Federal Government must be held accountable for its activities. Otherwise, it could become master rather than servant of the people. In the context of this refreshing new attitude of the Reagan administration, I would like to share a favorite passage from American literature. Henry David Thoreau wrote:

I went to the store the other day to buy a bolt for our front door, for, as I told the storekeeper, the governor was coming here. "Aye," said he, "and the Legislature too." "Then I will take two bolts," said I. He said that there had been a steady demand for bolts and locks of late, for our protectors were coming. H. Thoreau, *Walden and Civil Disobedience*, (O. Thomas ed. 1966).

The Freedom of Information Act can often act like one of Thoreau's bolts; it can protect us from our protectors by giving us sound knowledge about how to comply with government regulations or how to challenge an arbitrary government decision.

Yet achieving an informed citizenry is a goal to be balanced with other vital societal aims. Indeed, society's interest in an open government can conflict with its interest in protecting personal privacy rights and with the overriding public need for preserving the confidentiality of national defense and criminal investigative matters, among other matters. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances, and appropriately protects all interests, while placing emphasis on fully responsible disclosure. (See S. Rept. 813, 89th Congress, 1st session 3 (1965)).

Just as the Freedom of Information Act holds the government accountable to an informed electorate, FOIA itself must be held accountable. Since the enthusiastic rewrite of the act in 1974, it has at times frustrated rather than fulfilled its basic mission of insuring government efficiency and informing voters. FOIA has occasionally disrupted vital law enforcement activities and has been misused by businesses who had no intention of keeping abreast of government programs but found it a convenient tool for obtaining confidential information about a competitor.

This bill restores the balance between public access to government information and efficient execution of necessary functions. The compromises agreed to in an effort to accommodate

the competing interests of open government and confidentiality represent a good-faith effort on all sides to mold a better FOIA. This bill achieves that goal and therefore furthers our deeply engrained notions of an informed citizenry and a responsible government.

By Mr. GRASSLEY (for himself, Mr. THURMOND, Mr. DOLE, and Mr. DENTON):

S. 775, A bill entitled the "Government Accountability Act of 1983"; to the Committee on the Judiciary.

## GOVERNMENT ACCOUNTABILITY ACT OF 1983

● Mr GRASSLEY. Mr. President, I am once again introducing legislation together with the distinguished chairman of the Senate Judiciary Committee, Senator STROM THURMOND, Senator BOB DOLE, and Senator JEREMIAH DENTON, to deal equitably with the serious problem of the increasing number of lawsuits filed against Federal employees in their individual or personal capacities.

In the last Congress I introduced nearly identical legislation to the bill that I am offering today. That bill, S. 1775, was referred to the Judiciary Committee which in turn routed the bill to the subcommittee which I chaired, the Subcommittee on Agency Administration, presently the Subcommittee on Administrative Practice and Procedure. We held three hearings on the bill in the subcommittee and reported the bill to the full Judiciary Committee very close to the lameduck session of Congress. While time was not on our side in the 97th Congress, I intend in this Congress to quickly process this bill and send it to the full committee and Senate floor for consideration.

I had the honor of writing a chapter on the Federal Tort Claims Act for the Free Congress Research and Education Foundation's book, which will be available soon, entitled "Criminal Justice Reform." I believe that this chapter is a helpful analysis of the events that have led to the urgent need for the protections mandated by this legislation and ask that it be printed in the RECORD.

There being no objection, the chapter was ordered to be printed in the RECORD, as follows:

## CRIMINAL JUSTICE REFORM

A thirty year veteran forest ranger in the Idaho Panhandle National Forest directs Forest Service employees to remove garbage, rusted bus hulls, and scrap metal from a mining site where it has festered for five years. Prior to implementing the cleanup plans, notice of the removal is provided to the former lessee mining company which delivers no response. The ranger is unaware of a pre-existing agreement that transfers the scrap metal to the plaintiff. Two years after the cleanup, there is a knock on the door and the ranger is greeted with a summons and complaint requesting \$48,000 in compensatory damages and \$100,000 in punitive damages for violation of the plaintiff's constitutional rights. Three years later, a jury finds against the ranger and awards \$1,000 in compensatory damages

plus \$216.50 in court costs. The appeals process begins.<sup>1</sup>

Federal employees are being increasingly sued for decisions made during the course of a workday. From forest ranger to director of the National Cancer Institute, from meat inspector to cabinet officer, our entire federal workforce is potentially subject to personal liability suits for decisions that are made in carrying out federal missions. Since the Supreme Court's 1971 decision in the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>2</sup> federal employees have been subject to personal liability, which translates to money damages, for what the Court termed "constitutional torts". The *Bivens* case arose from a compelling factual setting. Narcotics agents ransacked a citizen's apartment, arrested and manacled him in front of his wife and family, and ushered him to a federal courthouse where he was interrogated, booked, and subjected to a visual strip search. This internment was effectuated without probable cause for a search warrant.

Most constitutional torts arise in a much more mundane setting. While immediately following the *Bivens* decision these actions arose in the context of law enforcement, they increasingly have arisen in the realm of regulatory or personnel actions taken by federal employees.<sup>3</sup>

The Department of Justice estimates that there are at present over two thousand lawsuits pending against federal employees in their individual capacities for alleged violations of constitutional rights. That number is conservative as it relates to actual numbers of federal employees involved in pending litigation because multiple defendants are sued in nearly seventy-five percent of all cases<sup>4</sup> and some cases involve as many as thirty to forty-five defendants.<sup>5</sup> The Department further estimates that since 1971 there have been approximately ten thousand lawsuits lodged against federal employees. Of that total, only fifteen have resulted in judgments for plaintiffs.

As Chairman of the Senate Subcommittee on Agency Administration, I have conducted three hearings on legislation which I introduced in response to what I view as a terribly unfair and unproductive situation. While a federal employee embroiled in litigation undergoes untold anguish, it is the taxpayer who is the ultimate loser in this process; and a triple loser to boot. Taxpayer monies are spent defending employees for what often amount to harassment suits. Taxpayer monies are spent paying employees who are too intimidated by threats of litigation or ensuing litigation to effectively and innovatively carry out their designated functions. Taxpayer monies are spent in paying private attorneys fees resultant from the Department of Justice's policy of hiring outside private counsel where its own representation of a federal employee might produce a conflict of interest.

My legislation is fashioned to make the best use of taxpayer funds while at the same time insuring adequate compensation to a plaintiff whose constitutional rights have been violated. So often is the case, that even if a plaintiff wins a suit, the defendant is judgment proof. The government will be substituted as the exclusive defendant in all constitutional actions and generally the exclusive defendant in all tort suits in which the Attorney General certified that the employee was acting within the scope of his employment. Hence the Department of Justice will no longer have to excuse itself from suits and hire private counsel to avoid con-

<sup>1</sup> Footnotes at end of chapter.

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acquisition of the same data or blueprints under FOIA. Testimony from the Justice Department and the Department of Defense has made the committee aware that technical data in the form of blueprints, manuals, production and logistic information formulas, designs, drawings, and other research data in the possession of agencies may be subject to release under the Freedom of Information Act. Much of this data was either developed by the Government or more typically submitted to the Government in conjunction with research and development of procurement contracts.

An example of the type of problem not contemplated by Congress during formulation of the FOIA exemptions in 1966 is the request from a foreign national seeking 70 documents totaling more than 9,000 pages which deal with the internationally sensitive area of satellites and their use by military organizations. An expense of over \$4,000 in U.S. taxes would be required by the Department of the Air Force, in addition to more than 1,000 mid-level management man-hours, on a nonreimbursable basis, just to prepare the material for review. Moreover, a substantial portion of this sensitive, defense information is technical material on the "Critical Military Technologies List" which is subject to Federal export laws.

As a result of revisions to FOIA at the end of 1974, the quality and quantity of informant cooperation with the Secret Service has diminished dramatically. Under the current FOIA, informants are increasingly reluctant to come forward because they are fearful their identities will be revealed, adversely affecting the Service's ability to perform their protective and criminal investigative missions.

Robert R. Burke, Assistant Director for Investigations at the Secret Service, testified before the Constitution Subcommittee that his agency had approximately 75 percent less informant information than it had before the revised FOIA took effect at the end of 1974. Mr. Stewart Knight, Director of the Service, testified in 1977 that he had recommended that President Jimmy Carter refrain from traveling to two cities within the United States because the Service did not have adequate information to guarantee his safety. Mr. Burke's 1981 testimony noted that conditions have deteriorated even further since Mr. Knight's statement.

## BILL PROVISION

The bill adds a new exemption (b)(10) to the Freedom of Information Act to exempt from mandatory disclosure, technical data that may not be exported lawfully outside of the United States except in compliance with the Arms Export Control Act (22 U.S.C. 2751, et seq.) and the Export Administration Act of 1979 (50 U.S.C. App. 2404).

This new exemption would insure that Congress intent to control the dissemination of sensitive technology could not be frustrated by a Freedom of Information Act request for information regarding technology subject to export control under these statutes. It would make clear that agencies such as the Department of Defense have the authority to refuse to disclose such information in response to a Freedom of Information Act request when the information is subject to export restrictions. This change would help effect Congress desire to limit and control the dissemination of critical technology. In the same vein, however, exemption 10 does not address the issue of restricting the flow of research information to, from or within the scientific community or society in general. Moreover, the proposed exemption has nothing to do with technical information developed within the academic community. On the contrary, this exemption merely gives the Federal Government the discretion not to disclose pursuant to a FOIA request defense-related technical information which is in the possession of the Federal Government, usually pursuant to research and development of procurement contracts. The submitter of such technical data is not precluded from disseminating it to the scientific community or elsewhere.

The bill also adds an additional exemption (b)(11) to FOIA which insures that the Secret Service will receive the cooperation and confidentiality necessary for its mission. As a result, the ability of the Secret Service to safeguard the President and other important individuals as well as informants who provide vital information, will not be compromised. The exemption specifically enables the Secret Service to better fulfill its functions in two ways. First, the Service will not be compelled to disclose significant security information already on file. Second, the Secret Service's information gathering capacity will be enhanced by the message conveyed to potential informants that any sensitive information that they provide will be protected.

## REASONABLY SEGREGABLE

## CURRENT LAW

The 1974 amendments to FOIA added a requirement that any portions of requested record that are "reasonably segregable" from exempt portions should be supplied to the requester.

## CURRENT POLICY IMPLICATIONS

Although the principle of reasonable segregability is laudable, it can in practice present problems in the fields of law enforcement and national security classifications. In those fields, a sophisticated requester may have the ability to piece together bits of information that seem harmless in isolation yet reveal exempt information when carefully analyzed.

## BILL PROVISIONS

The bill clarifies the standard of "reasonable segregability" in the case

of records containing material covered by exemptions one and seven allowing the agency to consider whether the disclosure of particular information would, in the context of other information available to the requester, cause the harm specified in exemptions one and seven.

## PROPER REQUESTS

## CURRENT LAW

Under current law, an agency is required to comply with a request for records made by any person, even if that person is not a U.S. person.

## CURRENT POLICY IMPLICATIONS

Existing law allows foreign nationals and governments to make FOIA requests. It is not at all uncommon for one Japanese firm to file a FOIA request seeking information about another Japanese firm or even a U.S. firm with which it competes.

Another aspect of the any person provision that seems somewhat inconsistent with FOIA's goals of an informed citizenry is that the act is heavily used by imprisoned felons. Over 40 percent of all requests received by the Drug Enforcement Administration are from persons in prison; 11 percent of FBI's requests come from prisoners. In many cases, these requesters seek information that could undermine legitimate law enforcement.

Parties to a lawsuit have used FOIA to circumvent discovery rules. The Supreme Court has stated that "FOIA was not intended to function as a private discovery tool." *NLRB v. Robbins Tire*, 437 U.S. 214, 242 (1978). Using FOIA as a discovery device can be a technique to avoid triggering reciprocal discovery.

## BILL PROVISIONS

The bill modified that aspect of the any person rule that permits aliens to use the U.S. FOIA statute. The Attorney General is granted authority to draft regulations to limit requests by imprisoned felons.

## CONCLUSION

The basic purpose of FOIA, more openness in government through an informed citizenry (see *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) is a very worthy and legitimate objective.

Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both, Letter to W. T. Barry, Lieutenant Governor of Kentucky, August 4, 1822.

This inspiring quote, although written by Madison as an argument for public education, not access to government files, was invoked in 1974 when the 1966 act was substantially rewritten as an appropriate reminder that our national policy favors an open and free exchange of ideas. In fact, another enduring passage would serve

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filts of interest. In addition the employee will no longer be deterred from carrying out his federal duties.

Testimony, both from federal employees who have been sued and from Assistant U.S. Attorneys who have defended federal employees, indicates that the numbers of sued employees are but a statistical quagmire of the anguish, fear, and betrayal that a federal employee experiences when he has been personally sued for actions taken to enforce the laws of the United States. Stress and anxiety are not easily allayed by even the most competent of U.S. Attorneys. As one employee in the throes of litigation put it:

"To say that this left a residual fear in my mind is to put it lightly. I was concerned. I was worried . . . I have mild angina and, by gosh, I found I wasn't having mild angina. I was having chest pains frequently at night. I would wake up with chest pains. I went to see my doctor and he said, 'Oh yes.' He said, 'that's the standard thing. You get a high anxiety level and you get chest pains from angina. I guess I'd better give you sleeping pills.' So for the first time in my life I was taking sleeping pills."

An action that threatens an employee's personal and professional assets potentially affects the quality of his life, not to mention his mental health.

Under Department of Justice procedures, a federal employee is provided with representation in state criminal proceedings and in civil and congressional proceedings in which he is sued or subpoenaed in his individual capacity. Representation is not provided in connection with federal criminal proceedings. Upon receipt of an agency's notification of request for counsel, either the Civil Division, the Civil Rights Division, the Criminal Division, the Lands and Natural Resources Division or the Tax Division determines whether the employee was acting within the scope of his employment and whether providing representation is in the interest of the United States. The employee is informed from the outset of the action that in no event will the government pay any judgment rendered against the employee.<sup>7</sup> Likewise, a settlement prior to the adjudication of a claim is paid by the employee.

Where conflicts of interest are not apparent and private representation is unnecessary, representation is afforded to employee defendants by Assistant United States Attorneys. These attorneys are in the best position to observe the practical effects of the current system of liability. They have a firsthand view of the employee's reaction to his dilemma and are aware of what kind of time and hence what kind of money is spent in defending these suits. Testimony from two former and two present U.S. Attorneys point out that representation of a government employee is fraught with conflict of interest potential from the outset.<sup>8</sup> After all, a U.S. Attorney's first loyalty is to the United States; his obligation to the employee's interest must come second. As one United States Attorney put it:

"In many instances the Government may prefer to take the risk of losing a substantial judgment rather than disclosing confidential information that could justify the agents' action. An agent who pictures his life savings being wiped out, if a substantial judgment is awarded him, will be seriously disheartened, if he learns that the Government is refusing to release information which would provide him with a complete defense."

Morale problems are likely to result from a situation in which an employee follows the directive of his employer, in this case the United States, and yet cannot be indemnified by that employer if his conduct is found to exceed constitutional bounds.

The Federal Tort Claims Act was enacted in 1946, largely due to Congressional discomfort with the doctrine of sovereign immunity. That doctrine is predicated on the common law theory that the king can do no wrong and therefore cannot be sued in his own courts.<sup>10</sup> The United States waived its immunity with respect to general liability for negligent tortious conduct on the part of governmental agents. Prior to the enactment of the Act, individuals seeking redress from the federal government for the commission of torts by its employees were forced to address their complaints to Congress, which had the power to enact a private relief bill for the individual. Congress enacted the Federal Tort Claims Act as a means of relieving itself from the burden of considering the merits of a plethora of individual tort claims.

With the advent of the Federal Tort Claims Act, the United States was liable for torts "in the same manner and to the same extent as a private individual under like circumstances."<sup>11</sup> Nevertheless, this general waiver excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>12</sup> While Congress has enacted several specific provisions that substitute the government for individual liability for a number of employee groups, the basic language of the Act gives the plaintiff an election to sue either the defendant employee or the government.

Since 1946, there has been no comprehensive review of the Federal Tort Claims Act. There has, however, been a series of Supreme Court decisions that have sanctioned suits filed at every level of government for alleged constitutional infringements. This line of cases, beginning with the Court's seminal decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>13</sup> underlies the creation of a personal remedy against an individual—commonly known as a *Bivens* action.

In *Bivens*, the Court recognized individual employee liability for violation of a citizen's fourth amendment rights. Against the backdrop of the Attica prison upheaval in New York, the May Day arrests in Washington, and the Collinsville raids in Illinois, Congress legislated a partial response to the *Bivens* decision. Congress amended the Federal Tort Claims Act to allow a suit to be brought against the U.S. for acts of assault, battery, false arrest, malicious prosecution and other similar wrongs committed by federal investigative agents.

While this amendment did much to alleviate the impact of the *Bivens* decision on "investigative or law enforcement officers of the United States government," which was defined to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of federal law,"<sup>14</sup> it did nothing to lessen the impact of subsequent decisions on federal employees. For example, in the 1978 term the Court allowed a fifth amendment suit against a member of Congress<sup>15</sup> and in the 1979 term the Court extended the ambit of *Bivens* to an eighth amendment suit against prison officials.<sup>16</sup> So, while initially constitutional tort actions were lodged against law enforcement agents under the fourth amendment, the Court has expanded its recognition of constitutional torts beyond those for violation of the fourth amendment to violations of the fifth and eighth amendments. Lower courts have applied the *Bivens*-based cause of action to suits involving violations of the first, fifth, sixth, eighth, ninth, thirteenth, and fourteenth amendments.<sup>17</sup> This expansion has

changed the character of suits that have been brought from those affecting law enforcement activities to those primarily directed at regulatory and personnel decisions.

A recurring theme throughout all the relevant Supreme Court decisions is that the Court is acting only in lieu of Congressional action. That action appears to be the best short term solution to a longstanding problem of employee liability.

Congress' failure to enact legislation to remedy the deficiencies of the *Bivens* decision has not been for want of trying. Indeed, as early as 1973, legislation was proposed that would make the United States exclusively liable for the constitutional and common law torts of its employees, but it was the enactment of the 1974 amendments to the Act that ultimately emerged as law.

In the 95th Congress, different versions of a bill were approved by Subcommittees of both chambers but were never reported out of the respective full Judiciary committees for floor action. In the 96th Congress, the legislation failed to progress out of either Judiciary Subcommittee.

The current legislative effort portends to be the most successful; a controversial aspect of former bills has been eliminated. In past bills, no consensus could be reached as to what form of administrative discipline should be applied to tortious employees.

Currently, there is a recognition that to attempt to legislate one mandatory disciplinary standard for every agency to follow is impracticable. Instead under the provisions of both the Senate and House bills, if a constitutional tort suit results in a judgment against the United States, or an award, compromise, or settlement paid by the United States, the Attorney General must forward the matter to the head of the department or agency which employed the individual for appropriate administrative or disciplinary action. Shedding the disciplinary proceeding from the bill in favor of utilizing an agency's own internal disciplinary mechanism has been a boost for both the bills' chances of passage; but a number of polemical issues still remain.

Traditionally the major proponent of this legislation has been the law enforcement community. Opposition to the concept has been principally voiced by the American Civil Liberties Union. While these two groups are closer to a compromise than ever before, there is still controversy over a provision allowing the United States to assert any defense available to the employee, which includes a qualified immunity known as the "good faith defense." The Department of Justice labels the defense as a crucial provision of the bill:

"It really goes to the merits of the plaintiff's claim by testing the action of an employee against the standard of reasonableness and good faith. We also think that taxpayers' funds, funds out of the U.S. Treasury, should not be paid out for actions taken in good faith. And when you bear in mind that any payment of a claim carries with it the threat, in effect, of a disciplinary action against the employee later, it would be self-defeating if you were going to make payments where the employee has acted in good faith because it seems clear that there should be no disciplinary proceedings under such circumstances.

"And certainly no employee wants to be found 'guilty,' if you will, of unconstitutional acts and suffer the resulting stigma. So that, even where the United States and not the employee would be the defendant, our view is that employees would be discouraged from acting in uncertain areas where they might subject the Government to fi-

nancial liability. We should not deter employees from acting in good conscience and in good faith and from being courageous, particularly in the law enforcement and other essential areas of Government activities."<sup>18</sup>

It is a defense worth preserving particularly in light of a recent Supreme Court decision. Past decisions of the Supreme Court have established the good faith defense as containing a subjective requirement of a good faith belief in the validity of one's actions as well as an objective requirement of reasonableness. "The official himself must be acting sincerely and with a belief that he is doing right,"<sup>19</sup> and that belief must be reasonable. Whether reasonable good faith exists is a factual question that places the burden of proof on the government employee.

The Supreme Court's most recent formulation of the good faith defense in *Harlow et al. v. Fitzgerald*,<sup>20</sup> alters the traditional two tiered test in favor of solely an objective qualified defense. The Court considered the scope of immunity available to senior aides and advisers of the President in civil tort actions based upon their official acts in *Harlow*. After considering past immunity decisions and noting the *Bivens* adage that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees"<sup>21</sup> the Court went on to state:

"It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties.'"<sup>22</sup>

The Court concluded that the subjective test of the good faith defense "has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial."<sup>23</sup> The Court found the intensive discovery that accompanies an inquiry into the subjective intent of a defendant to be burdensome to effective government.

The elimination of the subjective element of the good faith defense is a great boon to the insulation of the employee from time consuming discovery. Testimony from the American Civil Liberties Union concluded that individuals would spend as much time in court attempting to validate their good faith belief if the government was substituted as they would spend if they were being personally sued.<sup>24</sup> This decision mandates that the limits of the qualified immunity be defined in objective rather than subjective terms, thus bolstering the aim of allowing the public official to conscientiously perform his mission unburdened by litigation.

If the good faith defense is waived, we are faced with a strict liability situation in every case where even a technical infringement occurs. Every criminal defendant, even if convicted, who wins a motion to suppress evidence may receive automatic liquidated damages of at least \$1,000 as provided by the legislation. Without access to the knowledge that the employee was acting with a good faith belief in the propriety of his action, it would be more difficult both for the Department of Justice and the Agency to discern real offenders because of the vast number of cases requiring automatic payment. Retention of the defense is a disincentive

to the blank check theory of award and ensures that the plaintiff will receive a day in court to relate his version of the employee's conduct. Furthermore, the employee will, in turn, have an opportunity to defend his conduct in public. Finally, it must be noted that under the common law, the principal or employer sought to be held liable has always been able to raise the defenses of his agent.<sup>25</sup> The United States should be entitled to the same defenses as any employer.

Aside from opposition to incorporation of the good faith defense, a traditional objection to exclusive governmental liability is that it somehow disregards the elements of personal fault. It is felt that "the current law creates a significant incentive for compliance with constitutional rights because individual federal employees have a substantial fear of having to pay judgments and attorneys fees in lawsuits against them".<sup>26</sup> Yet as Chief Justice Burger noted in his *Bivens* dissent with reference to the exclusionary rule's effect on law enforcement officers, there is no empirical evidence to support the claim that the rule actually deters illegal conduct of government employees.<sup>27</sup> The forest ranger mentioned at the outset of this discussion testified at a Senate hearing that the lawsuit had an effect on his ability to make independent decisions:

"The unsettled suit has been an ominous cloud over my personal and financial situation for over 8 years. Even worse than the possible financial damage, is the uneasy feeling I get each time that I make a decision.

"I have forced myself to cope with this situation so that I can carry on my duties and responsibilities as a Federal manager, but it has not been easy. Litigation of the type I have experienced cannot help but affect decisions by me and other Forest Service employees close to the case.

"In the case that I have just described, the plaintiff is still operating on the Red Ives Ranger District. Each year I am faced with several decisions regarding his business operations on the Forest.

"One of the greatest anxieties in my case was the uncertainty at various points of wondering if the Government would continue to pay for the counsel who represented me or whether I might be forced to retain a private attorney."<sup>28</sup>

Some employees are blissfully unaware of their liability for decisions made in the scope of their employment. Those who are aware of potential liability are more than likely not so much deterred from taking illegal action as they are deterred from the legitimate objectives of a career.

Spokesmen for federal employee unions are quick to note that the effect of an adverse judgment on an employee's reputation is very much of a strong deterrent to misconduct.<sup>29</sup> A full range of disciplinary actions are available to underscore an employee's guilt. An employee may be discharged, demoted in grade, debarred from all Federal employment for a period not to exceed five years, suspended, reprimanded, or assessed a civil penalty.<sup>30</sup>

In summary, a grant of personal immunity for federal employees is needed to remedy a system that, perhaps because of an increasingly litigious bent, hinders rather than encourages production from its federal workforce. It is in society's interest, our interest, to see that the day's labor for the honest and conscientious federal employee is unthreatened by vexatious lawsuits. Such lawsuits, in the final analysis affect the quality of our government and the quality of our lives.

## REFERENCES

- <sup>1</sup> Hearings on Amendments to the Federal Tort Claims Act before the Subcommittee on Agency Administration, 97th Cong., 1st Sess. (1981) (hereinafter Senate Hearings, part I) p. 48-51.
- <sup>2</sup> 403 U.S. 388 (1971).
- <sup>3</sup> Hearing on Amendments to the Federal Tort Claims Act before the Subcommittee on Agency Administration, 97th Cong., 2nd Sess. (1982) (hereinafter Senate Hearing, part II) p. 174.
- <sup>4</sup> Senate Hearing, part II, p. 161.
- <sup>5</sup> Senate Hearings, part I, p. 12.
- <sup>6</sup> Id. at p. 110.
- <sup>7</sup> DOJ Statements of Policy: Representation of Federal Officials and Employees, 47 Fed. Reg. 38, 8172 (1982) (to be codified in 28 C.F.R. § 50.15).
- <sup>8</sup> Senate Hearings, part I, p. 56.
- <sup>9</sup> Id.
- <sup>10</sup> W. Holdsworth, History of English Law, 458-459 (5th ed. 1942).
- <sup>11</sup> 28 U.S.C. § 2674 (1971).
- <sup>12</sup> 28 U.S.C. § 2680 (a) (1970).
- <sup>13</sup> 403 U.S. 388 (1971).
- <sup>14</sup> 28 U.S.C. § 2680(h) (1976), as amended by Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974).
- <sup>15</sup> *Davis v. Passman*, 442 U.S. 228 (1979).
- <sup>16</sup> *Carlson v. Green*, 446 U.S. 14 (1980).
- <sup>17</sup> See, Lehmann, "Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials", 4 Hastings Const. L. Q. 531 (1977).
- <sup>18</sup> Senate Hearings, part I, p. 9.
- <sup>19</sup> *Wood v. Strickland*, 420 U.S. 308, 321 (1975).
- <sup>20</sup> *Harlow et al. v. Fitzgerald*, 50 U.S.L.W. 4815 (June 24, 1982).
- <sup>21</sup> Id. at 4819.
- <sup>22</sup> Id. citing *Gregoire v. Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950).
- <sup>23</sup> Id. at 4820.
- <sup>24</sup> Senate Hearings, part I, p. 103.
- <sup>25</sup> Contact with John Lodge Euler, Assistant Director of Torts Branch, Department of Justice, (August 12, 1982).
- <sup>26</sup> Senate Hearings, part I, p. 103.
- <sup>27</sup> 403 U.S. 388, 415 (1971).
- <sup>28</sup> Senate Hearings, part I, p. 49.
- <sup>29</sup> Id. at p. 123.
- <sup>30</sup> 5 U.S.C. § 1207(b).●

Mr. THURMOND. Mr. President, it is with great enthusiasm that I join the distinguished chairman of the Subcommittee on Administrative Practice and Procedure, Senator CHARLES GRASSLEY, in introducing today the Government Accountability Act of 1983. This important legislation responds to the dual goals of deterring unconstitutional Government activity and restoring the morale of Government employees, particularly law enforcement officers.

A series of Supreme Court and lower court decisions, beginning with the case of *Bivens* against Six Unknown Named Agents of the Federal Bureau of Narcotics in 1971, has spurred a proliferation of suits against individual Federal Government employees based on allegations of unconstitutional conduct. While these suits initially were aimed at law enforcement officers, the courts have sanctioned cases against a wide range of employees, particularly those with regulatory and personnel responsibilities. Thus, we have witnessed suits against forest rangers, members of the Civil Service Commission and officials of the Community Services Administration.

While the goal of deterring disregard for constitutional rights on the part of Government employees is a commendable one, the current system has generated several problems. In addition, it is questionable whether the original goal is being effectively served. In testimony before the Com-

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mittee on the Judiciary during the last Congress, representatives of the administration advised that over 2,000 suits were pending, many of which involved multiple defendants. A mere handful has resulted in money judgments for the plaintiffs. Despite the fact that these suits have been unsuccessful for the most part, they have taken an incredible toll upon the morale of our Federal Government employees. The threat of ruinous suits against them has a chilling effect on their performance. As Deputy Attorney General Schmuts has stated, they encourage a "timid discharge of official duties." Furthermore, the costs of lawyers hired by the Government and the individual employees are unduly burdensome. The Department of Justice, as of last year, had spent over \$3 million for private counsel for employees in cases of this nature. Finally, the current situation discourages the Government in its effort to recruit able servants.

The Government Accountability Act would make the United States the exclusive defendant in virtually all constitutional tort actions in which the Attorney General certifies that the employee was acting within the scope of his employment. This will serve not only to protect beleaguered Federal employees, but will benefit the Government and victims of constitutional abuse as well. It will insure that arguments advanced in the course of litigation will not be inconsistent with the legal policies of the Government. The victim, after the long litigation process, will not find his judgment uncollectible, as it might be from an individual Government employee. The administration, nevertheless, predicts that the bill will not result in an increase in suits. In short, the Government Accountability Act serves the interests of the public, the Government and the individual public employee.

In recognition of the urgent need for legislation to address the low morale of Federal employees, the Government Accountability Act will be held at the full committee. I am hopeful that we will be able to process this bill promptly in order to lessen the chilling effect of constitutional tort claims on our able and devoted Government employees, particularly those in law enforcement. I look forward to working with the administration and the distinguished sponsor of this bill to accomplish our shared goal.

By Mr. MOYNIHAN:

S. 776. A bill to amend the Internal Revenue Code to increase the amount that an artist may deduct when he contributes an artistic composition to charity; to the Committee on Finance.

## PEN AND INK ACT OF 1983

● Mr. MOYNIHAN. Mr. President, I rise today to introduce a bill to address one of the most unfair and unwise provisions of Federal tax law. I refer to the tax treatment under section 170 of

the Internal Revenue Code of charitable contributions of artists.

Under current law, an art collector who donates a painting to a museum can deduct the painting's market value. But when an artist donates a painting, he can deduct only the cost of the materials—the paint and the canvas. The same rule applies to a composer who donates a score, and to the writer who donates a manuscript, poem or other composition. In these cases, the artist can deduct only the value of his pen, ink, and paper. This has been the law since 1969.

It is unfair, because the artist has given the museum greater value than he is given credit for. It is unwise, because it leaves artists precious little incentive to donate their works to public collections. Daniel Boorstin, the Librarian of Congress, testified before the Finance Committee on October 22, 1979 that before this provision took effect, the Library received some 200,000 original manuscripts from writers each year. Since 1969, the Library has received only one major gift of self-created materials from a living author. Boorstin said:

The consequence of the reduced level of acquisitions will have a disastrous effect on scholarship, on the study and appreciation of American civilization.

Authors are now selling their works on the open market, dispersing them among numerous public collectors. Dr. Boorstin continued:

Thus, the material ceases to be available for research in public institutions. Even more alarming, these materials are usually stored where they suffer rapid deterioration and are subject to risks of fire, flood and theft. They are lost forever.

One response would be to permit artists to deduct the market value of their gifts. This is a simple answer, but it is far from the best remedy. Such was the law before 1969, when Congress amended it for good reason: it was being abused. Donald Lubick, Assistant Secretary in the Carter administration discussed the problem in Senate testimony 4 years ago.

Prior to the Tax Reform Act of 1969, a taxpayer, including an artist, who contributed appreciated property to charity was entitled to a charitable deduction based on fair market value even though the appreciation was never subject to tax. In many cases, this enabled an individual to obtain a benefit through a charitable contribution that would exceed the after-tax proceeds from a sale.

According to Mr. Lubick, artists in high tax brackets were better off giving away their works than selling them.

For example, assume an individual in a marginal tax bracket of 70 percent owns property worth \$100 that has a negligible cost. If the property were sold, the individual would owe \$70 in tax and would retain \$30. If the property were given to charity, the charitable deduction would reduce the donor's taxes by \$70.

The artist earned \$70 if he gave away the painting, as against only \$30 if he sold it.

Of course, this would not pose quite the problem it once did. The 1981 tax bill lowered the marginal tax rate to 50 percent, reducing the discrepancy. But there were many other problems, and a catalog of them can be found in Bittker and Stone, "Federal Income, Estate and Gift Taxation at pages 197 and 198. The point is that we should not just restore the pre-1969 law.

Then what is the answer? Let me phrase the question a little differently: What is the correct principle?

I propose that we permit the artist to claim a tax deduction for only what his donation costs him. When an artist in the 40-percent tax bracket donates a painting to a museum, he forfeits the opportunity to earn 60 percent of the market value. That is all he would be able to retain after taxes, were he instead to sell the painting. His deduction, therefore, should be 60 percent.

The cost to each artist is a function of his tax bracket. It is one minus the marginal tax rate. My bill has the tables, to which an artist would simply look to determine his "applicable rate."

Mr. President, this bill applies to contributions of "literary, musical or artistic compositions" to section 501(c)(3) organizations or to Government agencies. The artist must obtain a written statement from the donee declaring that the artwork has artistic significance and will be used by the donee in connection with its exempt function. For example, a university could use a donated sculpture for teaching purposes, but not to decorate the chancellor's office.

This legislation would not change the rules for politicians who donate their official papers. Politicians do not get tax deductions now, nor would they in the future.

The bill I am introducing today is a big improvement over existing law. It is worthy of enactment, and I urge my colleagues to support its speedy enactment.

I ask unanimous consent, Mr. President, that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

## S. 776

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

## SECTION 1. SHORT TITLE.

This Act may be cited as the "Pen and Ink Act of 1983."

## SEC. 2. DEDUCTIONS FOR CONTRIBUTING CERTAIN LITERARY, MUSICAL OR ARTISTIC COMPOSITIONS.

Section 170(e) of the Internal Revenue Code (relating to certain contributions of ordinary income and capital gains property) is amended by adding at the end thereof the following new paragraph—

"(4) SPECIAL RULE FOR CERTAIN CONTRIBUTIONS OF LITERARY, MUSICAL OR ARTISTIC COMPOSITIONS.—

"(A) QUALIFIED CONTRIBUTIONS.—For an individual who contributes a literary, musical or artistic composition created by his own

efforts to an organization described in section 501(c)(3) (that is exempt from tax under section 501(a)) or to a governmental unit described in section 170(c)(1), the amount of charitable contribution taken into account under this section shall be a percentage of the fair market value of such composition determined according to the applicable table.

"(B) APPLICABLE TABLES.—For purposes of subparagraph (A), the applicable table for—

"(i) married individuals and surviving spouses described in section 1(a) is table 1,

"(ii) heads of households described in section 1(b) is table 2,

"(iii) unmarried individuals described in section 1(c) is table 3, and

"(iv) married individuals described in section 1(d) is table 4.

"Table 1

"If the adjusted gross income is: The percentage is:

Over \$0 but not over \$5,500 .....	89
Over \$5,500 but not over \$7,600 .....	87
Over \$7,600 but not over \$11,900 .....	85
Over \$11,900 but not over \$16,000 .....	83
Over \$16,000 but not over \$20,200 .....	81
Over \$20,200 but not over \$24,600 .....	77
Over \$24,600 but not over \$29,900 .....	73
Over \$29,900 but not over \$35,200 .....	70
Over \$35,200 but not over \$45,800 .....	65
Over \$45,800 but not over \$60,000 .....	60
Over \$60,000 but not over \$85,600 .....	56
Over \$85,600 but not over \$109,400 .....	52
Over \$109,400 .....	50

"Table 2

"If the adjusted gross income is: The percentage is:

Over \$0 but not over \$4,400 .....	89
Over \$4,400 but not over \$6,500 .....	87
Over \$6,500 but not over \$8,700 .....	85
Over \$8,700 but not over \$11,800 .....	82
Over \$11,800 but not over \$15,000 .....	81
Over \$15,000 but not over \$18,200 .....	79
Over \$18,200 but not over \$23,500 .....	75
Over \$23,500 but not over \$28,800 .....	71
Over \$28,800 but not over \$34,100 .....	66
Over \$34,100 but not over \$44,700 .....	63
Over \$44,700 but not over \$60,600 .....	56
Over \$60,600 but not over \$81,800 .....	52
Over \$81,800 .....	50

"Table 3

"If the adjusted gross income is: The percentage is:

Over \$0 but not over \$3,400 .....	89
Over \$3,400 but not over \$4,440 .....	87
Over \$4,440 but not over \$8,500 .....	85
Over \$8,500 but not over \$10,800 .....	83
Over \$10,800 but not over \$12,900 .....	81
Over \$12,900 but not over \$15,000 .....	79
Over \$15,000 but not over \$18,200 .....	76
Over \$18,200 but not over \$23,500 .....	72
Over \$23,500 but not over \$28,800 .....	68
Over \$28,800 but not over \$34,100 .....	64
Over \$34,100 but not over \$41,500 .....	60
Over \$41,500 but not over \$55,300 .....	55
Over \$55,300 .....	50

"Table 4

"If the adjusted gross income is: The percentage is:

Over \$0 but not over \$2,750 .....	89
Over \$2,750 but not over \$3,800 .....	87
Over \$3,800 but not over \$5,950 .....	85
Over \$5,950 but not over \$8,000 .....	83
Over \$8,000 but not over \$10,100 .....	81
Over \$10,100 but not over \$12,300 .....	77
Over \$12,300 but not over \$14,950 .....	74
Over \$14,950 but not over \$17,600 .....	70
Over \$17,600 but not over \$22,900 .....	65
Over \$22,900 but not over \$30,000 .....	60
Over \$30,000 but not over \$42,800 .....	56
Over \$42,800 but not over \$54,700 .....	52
Over \$54,700 .....	50

"(C) CERTIFICATION REQUIRED.—This paragraph shall not apply unless the individual receives from the donee a written statement that the donated composition represents material of artistic, musical or literary significance and that the use of such composition by the donee will be related to the purpose or function constituting the basis for its exemption under section 501 (or, in the case of a governmental unit, to any purpose or function described in section 170(c)(2)(B)).

"(D) CERTAIN LETTERS, MEMORANDA, OR SIMILAR PROPERTY PREPARED BY GOVERNMENT OFFICIALS.—This paragraph shall not apply to a contribution by an individual of a letter, memorandum, or similar property that was written, prepared, or produced by or for the individual while he held an office under the Government of the United States or of any State or political subdivision thereof if the writing, preparation, or production of such property was related to the performance of the duties of such office."

#### SEC. 3. EFFECTIVE DATE.

The amendment made by this Act shall apply to taxable years beginning after December 31, 1983.●

By Mr. MOYNIHAN (for himself, Mr. HEINZ, and Mr. KENNEDY):

S. 777. A bill to provide that the moratorium of fringe benefit taxation (Public Law 94-427) applies to the value on certain campus housing furnished by educational institutions to their employees; to the Committee on Finance.

#### TAXATION OF CERTAIN CAMPUS HOUSING

● Mr. MOYNIHAN. Mr. President, I rise today to correct an Internal Revenue Service ruling that threatens to impose an unjust burden on our colleges and universities. It is a matter of immediate concern to four New England colleges: Amherst, Wesleyan, Smith, and Wellesley. It is of interest and concern to other institutions as well, including several in my home State of New York.

The Senator from Massachusetts (Mr. KENNEDY) and the Senator from Pennsylvania (Mr. HEINZ), I am pleased to add, join me as cosponsors.

A little background: Wesleyan University in Middletown, Conn., owns a number of houses and apartment buildings just off its campus. They are rented at cost to faculty members. They are unfurnished. The university pays the utility bills and has the snow shoveled in the winter, but offers no other services. This rental program is designed to help keep the faculty members near campus, so that they may have more contact with students. The rent is set to enable the university to recover its costs. Wesleyan is not out to make a profit.

On December 8, 1981, the Internal Revenue Service issued a technical advice memorandum stating that the difference between the rent Wesleyan charges its faculty members and the market rent for comparable dwellings is income to those who live in the houses. Thus, according to this IRS memorandum, Wesleyan should withhold taxes based on that income. Wesleyan would also owe extra social secu-

rity taxes. Moreover, the ruling is retroactive. Wesleyan has been ordered to pay up for the last 3 years. The IRS cannot reach farther back than 3 years because of the statute of limitations.

Amherst, Smith, and Wellesley are in the same position.

Six years earlier, in 1975, the IRS had issued a discussion draft of regulations it planned to publish on fringe benefits. This draft set off a furor. Members of Congress were deluged with mail from airline employees upset about the possibility of paying taxes for their discounts on airline tickets, and from college professors who did not want to be taxed on tuition remissions that colleges offer children of university faculty. The IRS quickly withdrew the discussion draft.

In 1978, Congress imposed a moratorium on such fringe benefit regulations. The moratorium has been extended twice. The last time was in the 1981 tax bill. It expires at the end of 1983. According to the Joint Committee on Taxation.

Although the [moratorium] relates only to the issuance of regulations, it is the intent of Congress that the [IRS] will not in any significant way alter, or deviate from the historical treatment of traditional fringe benefits through the issuance of revenue rulings or revenue procedures, etc.

But in 1981, the IRS insisted that this moratorium did not cover or affect its decision in the Wesleyan and other cases. According to the IRS, this decision did not change the historical treatment of faculty housing. The colleges say that is not so.

My bill makes one point, and clearly: The moratorium passed by Congress applies to housing on or near a campus that is supplied to the faculty members who occupy it. I do not ask the Senate to resolve the underlying controversy over whether the rental discounts are income. This fringe benefit ought to be settled at the same time as the other fringe benefit issues. My bill also requires that any decision on faculty housing be applied only prospectively.

This legislation is the same bill I introduced last Congress and offered as an amendment during the Senate Finance Committee's consideration of H.R. 7094. My colleagues on the Finance Committee unanimously agreed with my approach, and attached my bill as an amendment to H.R. 7094 on September 28, 1982. Unfortunately, the full Senate was not able to consider H.R. 7094 during the hectic closing days of the 97th Congress. I urge my colleagues to follow the example of the Finance Committee by supporting this bill in the 98th Congress.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows: